sale and distribution. The goods were acknowledged to be in interstate commerce. But this Court held that the sale was local in character and subject to a state gross receipts tax on sales. Appellant attempts to overcome the result of the *Berwind-White* case by alluding to the unique characteristics of electricity, its generation, transmission and consumption saying that the state can find no local activity. But this argument has long since been refuted in the famous case of *Utah Power and Light Co. v. Pfost,* 286 U.S. 165 (1932).

Appellant stresses the fact that a great risk is present and in fact it has already experienced double taxation from the operation of its business, and includes in the stipulations and argues the point, all of which is immaterial and irrelevant to this suit, about the New Mexico tax levied on the generation of electric energy in New Mexico. It is to be noted that the New Mexico statute is not now in effect, and in fact Appellant is not paying any generating tax in New Mexico, nor to the State of Texas on current moving out of Texas into New Mexico, only paying on the electric energy sold in the operation of the public utility companies in the three incorporated cities in Texas.

The electric energy so sold in the above mentioned cities and towns is gone, it has been used up, it will not be nor can it ever be taxed again, therefore, no risk exists for multiple taxation. If New Mexico were to impose any type of tax on the operation of Appellant in that state it will be on something other than the product upon which the tax in question is levied. The cases heretofore cited and discussed in this brief uphold the taxing of both generating and the sale of electricity.

The tax levied is on the sale of the electric energy to customers primarily in the three incorporated cities or

towns in Texas, heretofore mentioned. It has been completed in Texas, and as stated above there is no risk, no danger of multiple taxation present.

This Court met the attack on multiple taxation in the case of *General Motors v. Washington, et al.*, dated June 8, 1964, 84 S. Ct. 1564 (1964), when it said:

> "A more difficult question might arise from Appellant's claim of multiple taxation. Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 440 (1939). General Motors claims that some of its products taxed by Washington are manufactured in St. Louis where a license tax, measured by sales before shipment, is levied. See American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919). It is also urged that General Motors' Oregon based activity which concerns Washington sales might afford sufficient incidents for a similar tax by Oregon. The Court touched upon the problem of multiple taxation in Northwest Airlines v. Minnesota, supra, at 295, but laid it to one side as 'not now before us.' Thereafter, in Northwestern States Portland Cement Co. v. Minnesota, supra, at 463, we held that in this type of case, the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense.' Appellant has not done this. It has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax. Cf. International Harvester Co. v. Evatt, 329 U.S. 416, 421-423 (1947). And further, it has not been shown that Oregon levies any tax on Appellant's activity bearing on Washington sales. In such cases we have refrained from passing on the question of 'multiple taxation.' e.g. Northwestern States Portland Cement Co. v. Minnesota, supra, and we adhere to that position."

Appellant has not met any of the tests laid out in the *Washington* case. The mere fact that at one time

New Mexico levied a generating tax on electricity produced in that State, and Appellant paid taxes thereon and then paid the tax in question, all of which this Court has said was proper, forms no basis for multiple taxation at this time, nor can Appellant strike down a tax on mere speculation as to what might happen in the future.

E. CONCLUSION

We respectfully submit, therefore, that the Appellant presents no substantial question for the decision of this Court and that the appeal be dismissed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, H. Grady Chandler, one of the attorneys for Robert S. Calvert, et al., Appellees herein, and member of the Bar of the Supreme Court of the United States, hereby certify that, on the 7th day of August, 1965, I served copies of the foregoing Motion to Dismiss on the other parties hereto by mailing copies in a duly addressed envelope, air mail postage prepaid, to the attorney for Appellant, William Duncan, Attorney at Law, 1500 First National Building, El Paso, Texas.

H. Grady Chandler

H. GRADY CHANDLER

APPENDIX A

Text of statutes involved.

"Art. 11.03, Gas, Electric Light, Power or Water Works

(1) Each individual company, corporation, or association owning, operating, managing or controlling any gas, electric light, electric power, or water works, or water and light plant, located within any incorporated town or city in this State, and used for local sale and distribution in said town or city, and charging for such gas, electric lights, electric power, or water, shall make quarterly, on the first day of January, April, July, and October of each year, a report to the Comptroller under oath of the individual, or of the president, treasurer or superintendent of such company, or corporation, or association, showing the gross amount received from such business done in each such incorporated city or town within this State in the payment of charges for such gas, electric lights, electric power, or water for the quarter next preceding. Said individual, company, corporation, or association, at the time of making said report for any such incorporated town or city of more than one thousand (1,000) inhabitants and less than two thousand, five hundred (2,500) inhabitants, according to the last Federal Census next preceding the filing of said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date equal to .581% of said gross receipts, as shown by said report; and for any incorporated town or city of more than two thousand, five hundred (2,500) inhabitants and less than ten thousand (10,000) inhabitants, according to the last Federal Census next preceding the filing of said report, the said individual, company, corporation, or association at the time of making said report shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date an amount equal to 1.07% of said gross receipts, as shown by said report; and for

any incorporated town or city of ten thousand (10,000) inhabitants or more, according to the last Federal Census next preceding the filing of said report, the said individual, company, corporation, or association, at the time of making said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date an amount equal to 1.997% of said gross receipts, as shown by said report. Nothing herein shall apply to any such gas, electric light, power or water works, or water and light plant, within this State, owned and operated by any city or town, nor to any county or water improvement or conservation district.

(2) Nothing herein shall be construed to require payment of the tax on gross receipts herein levied more than once on the same commodity, and where the commodity is produced by one individual, company, corporation, or association, and distributed by another, the tax shall be paid by the distributor alone.

(3) No city or other political subdivision of this State, by virtue of its taxing power, proprietary power, police power or otherwise, shall impose an occupation tax or charge of any sort upon any person, corporation, or association required to pay an occupation tax under this Article. Nothing in this Article shall be construed as affecting in any way the collection of ad valorem taxes authorized by law; nor impairing or altering in any way the provisions of any contracts, agreements, or franchises now in existence, or hereafter made between a city and a public utility, relating to payments of any sort to a city. Nothing in this Article shall be construed as prohibiting an incorporated city or town from making a reasonable charge, otherwise lawful, for the use of its streets, alleys, and public ways by a public utility in the conduct of its business, and each such city shall have such right and power; but any such charges, whether designated as rentals or otherwise, and whether measured by gross receipts, units of installation, or in any manner, shall not in the aggregate exceed the equivalent of two per cent (2%) of the gross receipts of such utility within such municipality

derived from the sale of gas, electric energy, or water. Any special taxes, rentals, contributions, or charges accruing after the effective date of this Act, under the terms of any pre-existing contract or franchise, against any utility paying an occupation tax under this Article, when paid to any such city, shall be credited on the amount owed by such public utility on any charge or rental imposed for the use of streets, alleys, and public ways, levied by ordinance, and accruing after the effective date of this Act; provided that where valid ordinances have been enacted heretofore by cities imposing a charge or rental in excess of two per cent (2%) of the gross receipts of such utilities, nothing herein shall be construed so as to prohibit the collection of such sum as may be due said cities thereunder from the date of said ordinances up to the time this Article shall become effective.

(4) And provided further that utilities paying an occupation tax under this Article shall not hereafter be required to pay the license fee imposed in Article 5a, House Bill No. 18, Chapter 400, Acts of the Forty-fourth Legislature, for the privilege of selling gas and electric appliances and parts for the repairs thereof, in towns of three thousand (3,000) or less in population according to the next preceding Federal Census. Acts 1959, 56th Leg. 3rd C. S. p. 187, ch. 1."

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